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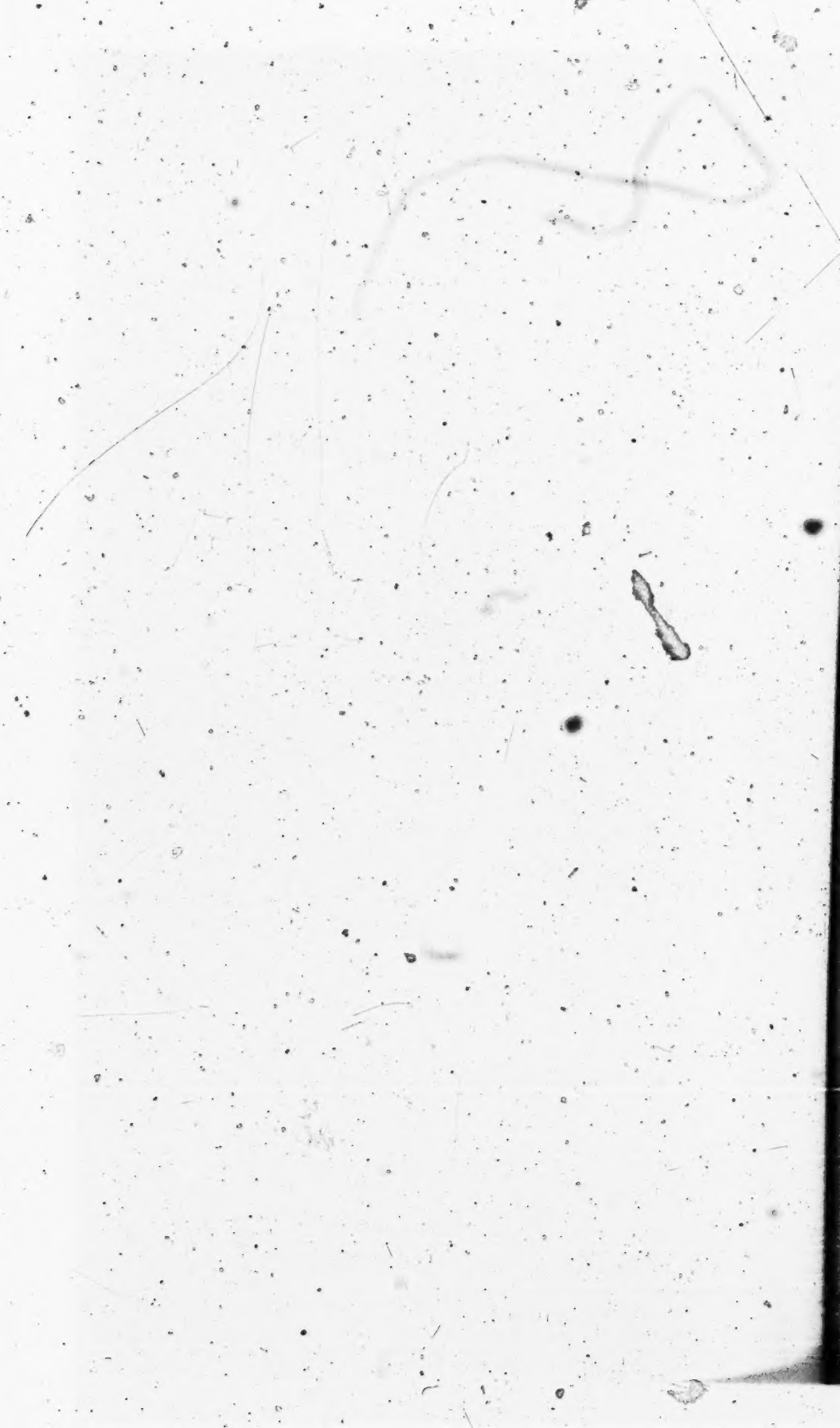

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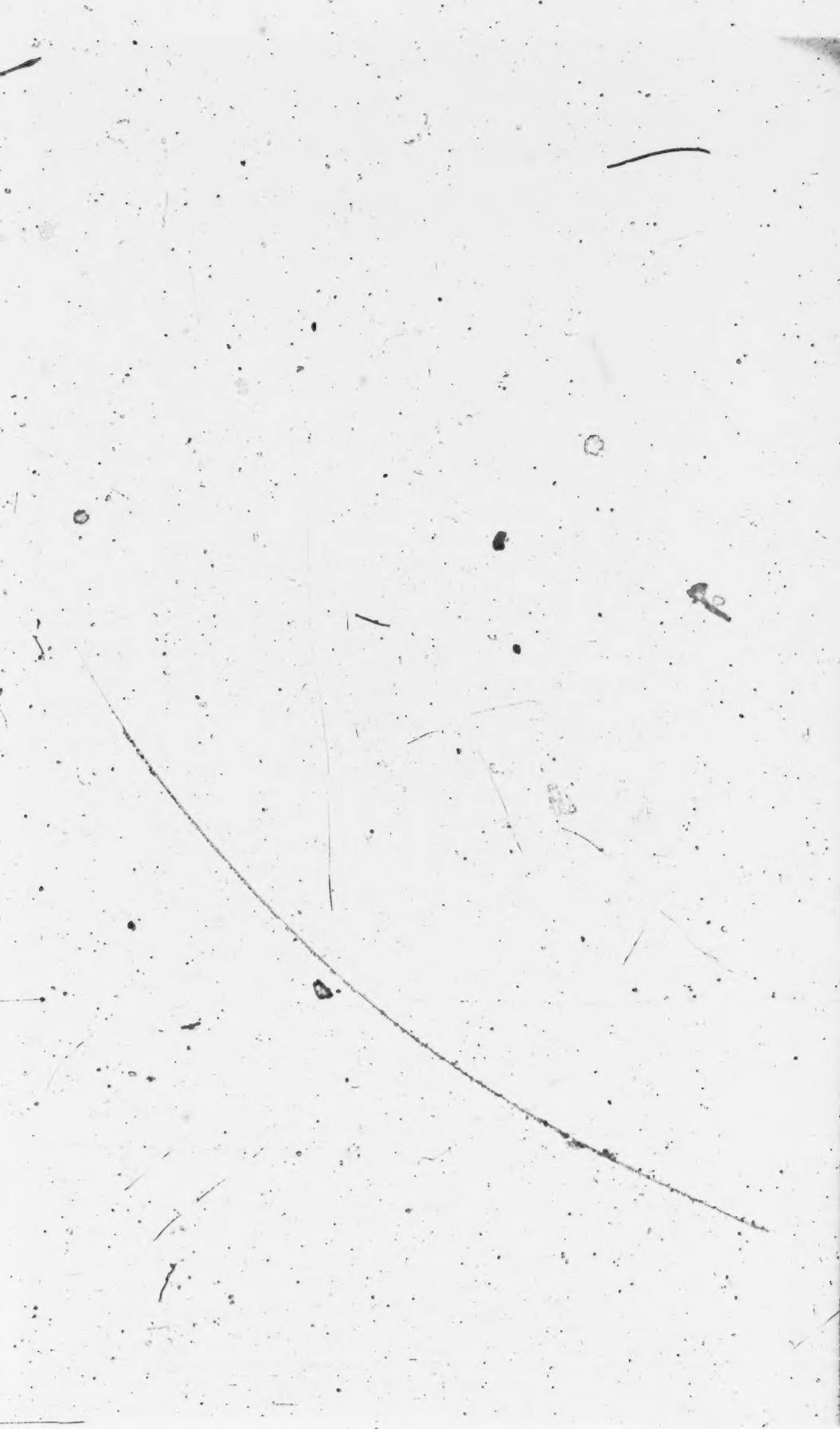

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 52

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 129) is not reported. The opinion of the Circuit Court of Appeals (R. 151–158) is reported in 159 F. 2d 257.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1946. (R. 159.) The petition for a rehearing was denied on January 23, 1947. (R. 201.) The petition for a writ of certiorari was filed on March 21, 1947, and was granted on April 28, 1947. (R. 211.) The juris-

diction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under Illinois law, the decedent had a possibility of reversion with respect to the property he transferred in trust in 1920.

2. If so, whether the value of the trust property is includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code, which applies to a transfer intended to take effect in possession or enjoyment at or after the grantor's death.

3. In the circumstances, did the Circuit Court of Appeals have power to reverse the Tax Court's decision that the transfer was not taxable?

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set out in the Appendix, *infra*, pp. 30–32.

STATEMENT

The pertinent facts as stipulated (R. 25–26) and found by the Tax Court (R. 126–129) may be summarized as follows:

Petitioners are the executors of the estate of Sidney M. Spiegel, who was born on August 16, 1872, and died testate on December 19, 1940. The decedent left surviving him two daughters, Katherine J. Spiegel, born March 1, 1897, and Julia S.

Michels, born March 7, 1907, a son, Sidney M. Spiegel, Jr., born August 8, 1904, and three grandchildren, Robert Michels, Jr., born August 21, 1930, Helen Katherine Michels, born November 17, 1936, and Sydney Ann Michels, born November 14, 1938. (R. 126.)

On January 2, 1920, the decedent executed a trust agreement under which he transferred to himself and Modie J. Spiegel as trustees, 625 shares of Spiegel's House Furnishing Company and 750 shares of Spiegel May Stern Company. (R 126.) Broad powers of management were reserved to the trustees. (See paragraph 1, R. 86, 126–127.)

The trust was to last for the settlor's life, and during that period the income was to be paid to his three children or their descendants. The income provisions were as follows (R. 86–87, 127):

> 2. The Trustees, and the survivor of them, and any successor trustee, shall collect and receive all income derived therefrom, or from any substitutes therefor, and shall during the life of myself, said Sidney M. Spiegel, divide said net income into three (3) equal parts, and pay or use one of said parts of said income to or for the maintenance, support and education of my three (3) children, Katherine J. Spiegel, Sidney M. Spiegel, Jr., and Julia K. Spiegel—such income to be distributed at convenient intervals each year. In the event that any of

> my said three (3) children shall die prior to my death, then the share of such income to which such deceased one of said three (3) children would have been entitled shall go to the child or children of such deceased child of mine, in equal parts, and if there be no such child or children of any such deceased child of mine, then such income shall be divided equally among the survivors of said three (3) children of mine, and their descendants, per stirpes and not per capita.

At the settlor's death, the corpus was to be paid over to his three children or their descendants, and if any child should have predeceased the settlor without leaving any descendants, his share was to go to the remaining children. The trust provisions in this respect were as follows (R. 87, 127–128):

> 3. Upon my death, the said Trustees, and the survivor of them, or any successor Trustee, shall divide said trust fund, and any accumulated income thereon then in the hands of said Trustees, equally among my said three (3) children, and if any of my said children shall have died, leaving any child or children surviving, then the child or children of such deceased child of mine shall receive the share of said trust fund to which its or their parent would have been entitled, and if any of my said three (3) children shall have died without leaving any child or children him or her

> surviving, then the share to which such deceased child of mine would have been entitled shall go to my remaining children, and the descendants of any deceased child of mine per stirpes and not per capita.

The trust instrument also contained spendthrift provisions, as follows (R. 87):

> 6. None of the beneficiaries of the trust estate shall at any time be permitted to anticipate the payments to which any of them may be entitled hereunder by any order, assignment or otherwise.

No part of the corpus held by the trustees at the grantor's death was included in the gross estate shown on the estate tax return filed by the executors of the grantor's estate. In recomputing the estate tax, the Commissioner included in the decedent's gross estate $1,140,606.30, the fair market value of the entire trust corpus and accumulated income held by the trustees on December 19, 1940, the date of decedent's death. (R. 128.)

The transfers of the property to the above trust on January 2, 1920, were not made in contemplation of death. (R. 128.)

On the basis of these facts, the Tax Court held that the value of the trust was not includible in decedent's gross estate under Section 811(c) of the Internal Revenue Code. This holding was based on the Tax Court's conclusion that, in creating the trust, the decedent had retained no "string or tie" amounting to a possibility of re-

version and that, therefore, the doctrine of *Helvering* v. *Hallock*, 309 U. S. 106, and decisions derived from it, are inapplicable. (R. 129.) The Circuit Court of Appeals reversed, holding that the decedent had a reversionary interest by operation of law (in the event that the beneficiaries should predecease him) which required the inclusion of the value of the trust property in his gross estate. (R. 151–158.)

SUMMARY OF ARGUMENT

I

This being an Illinois trust, it should be construed in accordance with Illinois law. So construing it, the Circuit Court of Appeals correctly held that if none of the beneficiaries had survived the settlor, and that was a possibility, the trust would have failed and there would have been a resulting trust in favor of the settlor. If there be any doubt about the Illinois law, then the doubt should be resolved against the taxpayers, who have the burden of showing by clear and convincing proof that the local law supports their contention that there was no possibility of reversion. Cf. *Helvering* v. *Leonard*, 310 U. S. 80, 86. Moreover, in the absence of a definite conviction of error, this Court has stated that it will ordinarily accept the judgment of the Circuit Court of Appeals with respect to the law of a State included in the circuit, and we submit there was no error

in the conclusion of the Circuit Court of Appeals here. Cf. *Helvering* v. *Stuart*, 317 U. S. 154, 163.

II

The instant transfer is taxable under Section 811 (c) of the Internal Revenue Code as one intended to take effect in possession or enjoyment at or after the grantor's death. All of the provisions for distribution of the corpus were made with reference to the grantor's death and the interests of the remaindermen were all conditioned on survivorship. And since the trust property would have reverted to the grantor if he had survived all the beneficiaries, it necessarily follows that the transfer is taxable. *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Helvering* v. *Hallock*, 309 U. S. 106. The basic reason why transfers of this type fall within the statute is that the rights of the beneficiaries are in fact dependent upon their surviving the grantor and that the grantor has retained a contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the ultimate takers. And it seems plain that where the settlor has so carved up the property that there is a possibility of reversion by operation of law the result is the same as if he had expressly reserved the identical reversionary interest. The Treasury regulations, which undertake to interpret the statute and the decisions of this Court, explicitly provide that section 811 (c) applies in situations

such as the instant case. These regulations are reasonable and should not be held invalid.

III

The rule in *Dobson* v. *Commissioner*, 320 U. S. 489, not only does not prevent the Circuit Court of Appeals from reviewing the Tax Court's decision in a case like this, but it affirmatively sanctions such review. The fundamental question is one of law, involving as it does the interpretation of a statutory provision, and it turns upon a generalizing principle with respect to the efficacy of a possibility of reverter by operation of law which has been specifically included in all of the Treasury Regulations issued since *Helvering* v. *Hallock*, 309 U. S. 106, was decided. Where the issue is the validity of a Treasury regulation of general scope, the *Dobson* case has no application. In circumstances such as these, there is no adequate basis for any contention that the Tax Court's decision must be accepted as final.

ARGUMENT

Preliminary analysis.—Had the decedent explicitly provided that the trust corpus would be restored to him in the event that all the beneficiaries should die during his own lifetime, then the trust corpus would clearly be includible in his gross estate under Sec. 811 (c). Such result would be plainly compelled by *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, which is different only in the im-

material respect that the grantor had to outlive two, instead of three, children and their descendants.

In the present case, the decedent has not explicitly provided that the corpus was to be returned to him in the event that he should outlive all his children and their descendants. He has made no provision whatever for the disposition of the corpus in the event of such contingency. It is the Government's position, however, that, under applicable Illinois law, the corpus would be restored to him in such circumstances, just as though he had explicitly provided therefor. And it is the Government's further contention that the operation of Section 811 (c) does not depend upon whether the settlor retains a reversionary interest by an explicit reservation, as in the *Fidelity Co.* case, or whether he achieves the *identical* result by merely failing to provide for the contingency of his surviving the beneficiaries. In both situations, the beneficiaries' rights in the corpus depend upon their surviving the settlor, and in both situations the settlor would reacquire the corpus in the event that he survived the beneficiaries. The very theory of *Helvering* v. *Hallock*, 309 U. S. 106, upon which the *Fidelity Co.* decision is based, would forbid drawing any distinction for tax purposes between situations involving *identical* property interests merely because they were created by different conveyancing devices. Moreover, the Treasury Regulations

(Regulations 105, Sec. 81.17, as amended by T. D. 5512) expressly provide for the inclusion of the corpus in the settlor's gross estate if the beneficiaries' rights depend upon their surviving the grantor, and if the decedent "possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer *or otherwise.*)" Indeed, these provisions in the regulations are followed by a number of examples, and "Example (7)" describes precisely the type of situation that is involved herein. See *infra,* pp. 31–32.

Accordingly, we shall contend, *first,* that the legal effect of the trust instrument under Illinois law is the same as though the settlor had explicitly reserved the right to reacquire the corpus in the event that he survived the beneficiaries; *second,* that such transfer in trust falls within Section 811 (c); and, *third,* that the adverse ruling of the Tax Court as to the scope of Section 811 (c) was open to review by the court below.

I

THERE WAS A POSSIBILITY OF REVERSION OF THE TRUST CORPUS UNDER ILLINOIS LAW

1. This being an Illinois trust, the parties are in agreement that it should be construed in accordance with Illinois law. *Blair* v. *Commissioner,* 300 U. S. 5, 9–10; *Freuler* v. *Helvering,* 291 U. S. 35, 45; *Helvering* v. *Stuart,* 317 U. S. 154, 162. So construing it, the Circuit Court of Appeals

held, correctly, we submit, that if none of the beneficiaries had survived the settlor, and that was a possibility, the trust would have failed and there would have been a resulting trust in favor of the settlor. This is in accordance with the general rule that where a trust fails for want of beneficiaries, the trust property will revert to the grantor or his estate by operation of law. See Restatement, Trusts (1935), Sec. 411; Bogert, Trusts and Trustees (1935), Vol. 2, Sec. 468; Scott, Trusts (1939), Vol. 3, Sec. 411, p. 2175; Perry, Trusts (1911), Vol. 1, Sec. 160, pp. 248–249; *Doctor* v. *Hughes,* 225 N. Y. 305, 309; *Newton* v. *Hunt,* 134 App. Div. 325, 334, affirmed, 201 N. Y. 599. There seems to be a paucity of authority on the exact point in Illinois (see Restatement, Trusts, Ill. Ann. (1941), Sec. 411), but such cases as have been found clearly indicate that the Illinois rule is no different from the ordinary one. *Lill* v. *Brant,* 6 Ill. App. 366, 376; *Corwin* v. *Rheims,* 390 Ill. 205, 223; *Harris Trust & Savings Bank* v. *Morse,* 238 Ill. App. 232, 250.

In support of the contention that there was no possibility of reversion in the instant case, the petitioners have relied heavily upon cases such as *Lachenmyer* v. *Gehlbach,* 266 Ill. 11, which holds that in determining whether beneficiaries under a will take a vested remainder upon the death of the testator, the question is to be considered in view of the settled rule that the

law favors the vesting of estates, and they are regarded as vested unless the contrary intention is shown (see p. 18). It seems unnecessary here to give detailed consideration to such cases for whatever may be their significance, it is clear that they are of little aid in construing an *inter vivos* trust. They are apparently based upon the rule that a testator is presumed not to have intended to die intestate as to any portion of his property (*Scofield* v. *Olcott,* 120 Ill. 362, 374;[1] *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573, 580; *Lewis* v. *Howe,* 174 N. Y. 340, 346–348), and that rule has no application to an *inter vivos* trust where the grantor can deal with the property as he sees fit in case it reverts to him. *Chater* v. *Carter,* 238 U. S. 572, 585.[2] If the grantor in the instant case had survived all the persons designated as beneficiaries in the trust agreement, he could have done as he pleased with the property and it would not necessarily have gone upon his death to his intestate estate. Cf. *Burton* v. *Boren,* 308 Ill. 440; *Doctor* v. *Hughes, supra.* As stated above, it is the general rule that where

[1] The court there said: "It has been said, that the idea of any one deliberately purposing to die testate as to a portion of his estate and intestate as to another portion is so unusual in the history of testamentary dispositions as to justify almost any construction to avoid it. 2 Redfield on Wills, 235; 2 Jarman on Wills, (R. & T. ed.) 469."

[2] This Court said in regard to the trust in that case:

"In construing it, we are not called upon to strain the meaning of words, as is sometimes done to avoid intestacy when wills are to be construed."

a trust fails for want of beneficiaries the property will revert to the grantor by implication of law and this is also the rule in Illinois. *Lill* v. *Brant*, *supra*.

If any of the will cases are in point, then we submit that consideration should be given to the ones involving lapsed legacies. It is the general rule that where a legacy lapses by reason of the death of the legatee prior to that of the testator, the property falls into the residuum, or in the absence of a residuary clause, it is treated as intestate property. *Dorsey* v. *Dodson*, 203 Ill. 32, 37–38; *Belleville Bank* v. *Aneshaensel*, 298 Ill. 292, 303. The Circuit Court of Appeals below likened the instant situation to one where a legacy lapses and we submit that this is an apt analogy. A testator can make a new will when a legacy lapses, and here the situation is similar because the grantor could have done as he wished with the property if it had reverted to him. In neither case is it necessary to strain the construction of language in order to avoid intestacy as is done where the grantor is dead and can no longer direct the disposition of the property.

In any event, it will be remembered that these rules as to early vesting are merely rules of construction, not rigid rules of law, and they give way before circumstances pointing the other way. *Beach* v. *Busey*, 156 F. 2d 496, 498 (C. C. A. 6), certiorari denied, 329 U. S. 802; *Geiger* v. *Geer*,

395 Ill. 367; *Meldahl* v. *Wallace*, 270 Ill. 220; *Routt* v. *Newman*, 253 Ill. 185. Here, the facts indicate strongly that the decedent would not have wished the property to go to the estates of his children in preference to reverting to him had he survived all the persons named as beneficiaries in the trust instrument. The trust was to endure for the life of the grantor who named himself as one of the trustees with broad powers of control. The named beneficiaries were restricted to his children and their issue, and the trust was spendthrift in character. Cf. *Routt* v. *Newman, supra.* Moreover, the grantor was careful to provide that in the event of the death of any child without issue during the grantor's life, such child's share of the income and remainder was to be added to the shares of the surviving children. He made it quite plain that he did not wish to give any child the power to dispose of such child's share in the event that such child died without issue during the grantor's lifetime. In the circumstances, he could hardly have intended the corpus to pass, free from his own control, to his children's heirs or appointees, where all three of his children should die without issue during his lifetime. Plainly, the grantor intended his children to have defeasible interests only, and he intended them (or their descendants) to succeed to the corpus, only if they survived him. He certainly would not have wanted the property to vest indefeasibly during his lifetime in the heirs or appointees of his children who might not

have been his blood relatives. If the grantor's three children had died without any surviving issue during his lifetime, it is inconceivable that an Illinois court of equity would not have restored the corpus to him.

The cases of *Smith* v. *Dugger*, 310 Ill. 624, and *Harder* v. *Matthews*, 309 Ill. 548, cited by taxpayers (Br. 28) are not at variance with our position here. Neither involved transfers in trust; neither raised any issue as to a resulting trust; and even with respect to the issues there raised it was plainly recognized that the rule of construction relied upon "yields readily to any indication in the instrument" (*Harder* v. *Matthews*, 309 Ill. at p. 568) showing a different intention. Moreover, at least one of them (*Smith* v. *Dugger*, 310 Ill. at p. 625) involved a transfer for a cash consideration; and even in that situation the language of the court strongly indicates (p. 626) that if Frederick (one of the grantees) had died during the lifetime of his father (the grantor), and his brothers (co-grantees) had predeceased him, then Frederick's share would have reverted to the grantor. If anything, that case supports the conclusion of the court below that if the beneficiaries herein had died during the grantor's lifetime, there would have been a resulting trust in his favor.

2. Moreover, we submit that if there be doubt as to the Illinois law that doubt must be resolved here against the taxpayers. For, as this Court

has held, a taxpayer may not avoid the operation of a taxing provision by invoking local law, unless he establishes by "clear and convincing proof" that the local law supports his contention. *Helvering* v. *Fitch*, 309 U. S. 149, 156; *Helvering* v. *Leonard*, 310 U. S. 80, 86. And this Court has held that in the absence of "a definite conviction of error", it will ordinarily accept the judgment of the Circuit Court of Appeals with respect to the law of a State embraced within the circuit. *Helvering* v. *Stuart*, 317 U. S. 154, 163; *MacGregor* v. *State Mutual Co.*, 315 U. S. 280. We submit that the taxpayers have failed to discharge their burden of proof as to the Illinois law, and they have certainly failed to show that the judgment of the Circuit Court of Appeals was clearly and definitely erroneous.

In view of these considerations we submit that there plainly was a possibility under Illinois law that the entire trust corpus might have reverted to the instant grantor, and the reasoned judgment of the Circuit Court of Appeals to that effect was correct and should not here be disturbed.

II

THE TRANSFER IS TAXABLE UNDER SECTION 811 (c) OF THE INTERNAL REVENUE CODE

1. Passing now to the question of taxability, we submit that this case is controlled by *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Commissioner* v. *Estate of Field*, 324 U. S. 113; and *Goldstone* v.

United States, 325 U. S. 687. Those cases interpret *Helvering* v. *Hallock*, 309 U. S. 106, in such a way as to indicate clearly that transfers such as the instant one are taxable under Section 811 (c) of the Internal Revenue Code (Appendix, *infra*), which applies to transfers intended to take effect in possession or enjoyment at or after the grantor's death.

In *Fidelity Co.* v. *Rothensies*, the decedent had created a trust to pay the income to the settlor during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. The Court, utilizing the principles set forth in *Klein* v. *United States*, 283 U. S. 231, and *Helvering* v. *Hallock*, *supra*, held the full value of the corpus includible in the grantor's gross estate as a transfer intended to take effect in possession or enjoyment at or after the grantor's death under Section 302 (c) of the Revenue Act of 1926, which has been carried forward into Section 811 (c) of the Internal Revenue Code. In so holding the Court said (pp. 111–112):

> It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability.

> The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra,* 118. No more should the measure of the tax depend upon conjectures as to propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

In the *Field* case, the decedent created a trust during his lifetime, reserving the income for life and also the right to get back the corpus if he should survive his two nieces. He did not survive them and it was held that the full value of the trust property was includible in his gross estate under Section 302 (c). In so holding, the Court referred to its decision in the *Fidelity* case and also said (p. 116):

> The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It

> makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

In the *Goldstone* case the decedent had purchased a single premium life insurance policy and an annuity policy in combination. The death benefits under the life contract and a refund under the annuity contract were payable at the decedent's death to his wife, or, if she predeceased him, to their daughters. If the decedent survived both his wife and daughters, the proceeds were payable to his estate. The incidents of ownership as to each contract could be exercised by the decedent's wife during her lifetime and upon her death such rights were exercisable by the decedent if he survived her. The wife did not exercise her rights of ownership and she outlived the decedent and became the recipient of the proceeds of the policies when he died. The Court held such proceeds includible in the decedent's gross estate under Section 302 (e). In so holding the Court took the view that the wife's unused powers, if significant at all, only added to the remoteness of the reversionary interest and did not erase it; and since such interest existed at the time of the decedent's death, delaying until then the determi-

nation of the ultimate possession or enjoyment of the property, the transfer was taxable.

It will be noted that in deciding the foregoing cases the Court did not undertake to draw any distinction between express reversions on the one hand and implied reversions on the other. Indeed, the language of the opinions indicates clearly that none should be made. Thus in *Fidelity Co.* v. *Rothensies, supra,* where there was an express reservation of a contingent power of appointment but no express provision with respect to the possibility of the decedent's surviving her daughters and their descendants, the Court treated as relevant the consequences that would flow in that case from such survival. This demonstrates, we submit, that for the practical purposes of the estate tax a possibility of reversion by implication of law is just as effective as one expressly retained. The very theory upon which the *Hallock* case was decided would forbid drawing any distinction between a reversionary interest expressly reserved and an identical interest that comes to the grantor by operation of law; for, it could hardly matter whether the grantor provides for his reversionary interest by the conveyancing device of expressly reserving it, or whether he achieves the identical result by the conveyancing device of merely remaining silent as to what would happen to the corpus in the event that he should survive the beneficiaries.

2. All of the Treasury Regulations promulgated

since the *Hallock* case was decided (1940) are in harmony with this view. Thus, shortly after the *Hallock* decision, Article 17, Treasury Regulations 80 (1937 ed.), was amended by T. D. 5008, 1940-2 Cum. Bull. 286, so as to make clear that property is includible in the donor's gross estate if it is to revert to the donor in the event that he should "survive the donee or another person, or the reverting of the property is conditioned upon some other contingency terminable by his death." Moreover, "* * * it is unimportant whether his interest be denominated a reversion or a possibility of reverter, *whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested,* and the tax will apply, * * * without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916." [Italics supplied.]

Substantially identical provisions were included in Section 81.17 of Treasury Regulations 105 (promulgated in 1942). Thereafter, these regulations were clarified still further in 1946, as shown in the Appendix, *infra,* pp. 30–32. As they now stand, the regulations set forth the general principles involved in cases of this type, and then undertake to give a number of examples. Thus, in the statement of general principles, the regulations require merely that the transfer be such that "(1) possession or enjoyment of the trans-

ferred interest can be obtained only by beneficiaries who must survive the decedent, and (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)". And Example (7) which gives a concrete illustration of these principles is as follows:

> *Example* (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

The instant case presents an identical situation. These regulations are reasonable and should not be held invalid.

3. In the instant case the Circuit Court of Appeals correctly held that the possibility that the property might revert to the settlor by operation of law was enough to support the tax. Four other Circuit Courts of Appeals have reached the same conclusion. See *Commissioner* v. *Bank of California*, 155 F. 2d 1 (C. C. A. 9), certiorari denied, 329 U. S. 725; *Commissioner* v. *Bayne's*

Estate, 155 F. 2d 475 (C. C. A. 2); *Beach* v. *Busey*, 156 F. 2d 496 (C. C. A. 6), certiorari denied, 329 U. S. 802; *Thomas* v. *Graham*, 158 F. 2d 561 (C. C. A. 5).[3]

The taxpayer relies (Br. 40) upon *Central Hanover Bank & Trust Co.* v. *United States*, 58 F. Supp. 565 (C. Cls.), which is of doubtful authority in the Court of Claims itself, in the light of its later decision in *Pennsylvania Co.* v. *United States*, 62 F. Supp. 697, where it recognized the efficacy of a possibility of reversion by operation of law.

The decisions in the Tax Court in cases of this kind are contradictory and confusing. In *Estate of Leaman* v. *Commissioner*, 5 T. C. 699, the Tax Court held in circumstances quite similar to those in the instant case that there was a taxable transfer; but in later decisions (*Estate of Hughes* v. *Commissioner*, 7 T. C. 1348, on appeal (C. C. A. 2), and *Estate of Friedman* v. *Commissioner*,

[3] A contrary result was reached by the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Estate of Church*, now pending before this Court, No. 96, present Term. However, the Third Circuit did not decide the issue on the merits; it merely held that it was precluded from reviewing the decision below on the authority of *Dobson* v. *Commissioner*, 320 U. S. 489. It is true that the Third Circuit took the view some years ago in *Commissioner* v. *Kellogg*, 119 F. 2d 54, that a possiblity of reversion by operation of law is not so significant as one expressly retained, but in later decisions (*United States* v. *Tonkin*, 150 F. 2d 531, 534, certiorari denied, 326 U. S. 771; *Eldredge* v. *Rothensies*, 150 F. 2d 23, 24, certiorari denied, 326 U. S. 772), it appears to have renounced that view.

8 T. C. 68, on appeal (C. C. A. 3)), the Tax Court reached the opposite result, holding the transfers nontaxable and refusing to follow the decision of the Second Circuit in the *Bayne* case, *supra*, where, as above noted, such a transfer was held to be taxable. However, in a recent decision (*Estate of Bradley* v. *Commissioner*, 9 T. C. No. 20), the Tax Court appears to have changed its views again and sustained the tax where the decedent had an interest in the income and there was a remote possibility of reversion by operation of law.

As noted above, the basic reason why transfers of this type fall within the statute is that the grantor has retained a "contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries." *Fidelity Co.* v. *Rothensies, supra,* p. 112. And it seems plain that a possibility of reversion by operation of law is just as effective as one expressly retained to accomplish or contribute to such a result. See I Paul, Federal Estate and Gift Taxation (1942), Section 7.23, p. 368; also 1946 Supplement, Section 7.23, pp. 196–197.

The taxpayers rely strongly upon *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. That case was decided in 1929, prior to the decision in the *Hallock* case where the importance of a reversionary interest in a trust was finally established. It does not appear from the Court's opinion in the

Northern Trust Co. case that there was a possibility of reversion to the settlor, but even assuming that there was, nevertheless the point as to its effect was not raised or considered and the decision there is thought to stand merely for the proposition that where the grantor of a trust has parted with both the possession and the entire beneficial interest in the property, retaining no possibility of reversion, the mere passing of possession or enjoyment of the trust fund from the life tenant to the remainderman after the grantor's death, as directed in the trust instrument, is not sufficient to subject the property to inclusion in the gross estate as a transfer intended to take effect at or after death. Indeed, the necessity for so viewing the *Northern Trust Co.* decision is clearly shown by the reasoning of the Court (see pp. 348–349) that it was doubtful whether the statute was intended to reach such transfers and further doubtful that if construed so as to reach them the statute would be constitutional. Those doubts have now been swept away by *Helvering* v. *Hallock* (see also *Central Hanover Bank Co.* v. *Kelly*, 319 U. S. 94, 97–98), at least where there is a reversionary interest, and the statute has been construed in the *Hallock, Fidelity Co., Field* and *Goldstone* cases so as to make it abundantly plain that the statute operates whenever the provisions for distribution of the trust property are made dependent upon the grantor's death and he has retained some contingent interest, however re-

mote, in the trust property. The instant case is clearly within the scope of the later decisions, and taxability is not foreclosed by *Reinecke* v. *Northern Trust Co.* Had the grantor explicitly reserved the interest involved, it could not seriously be argued that the *Fidelity Co.* case is inapplicable. Accordingly, this case reduces itself to the narrow question whether a different rule should apply where the grantor achieves the identical result through a different conveyancing device. And the view that such a distinction is immaterial has been adopted in framing the Treasury regulation which is intended to serve as a comprehensive guide to the statute and is based upon the decisions of this Court in the *Hallock* case and later cases which follow it.

III

THE CIRCUIT COURT OF APPEALS HAD POWER TO REVERSE THE DECISION OF THE TAX COURT

The third question presented by the petition for certiorari is whether the Circuit Court of Appeals had power under *Dobson* v. *Commissioner, supra,* to review and reverse the decision of the Tax Court that the transfer was not taxable. The court held that it did and we believe the holding to be correct. It is in accord with the decisions of the Ninth and Second Circuits (*Commissioner* v. *Bank of California, supra; Commissioner* v. *Bayne's Estate, supra*) but in conflict with the Third Circuit's decision in *Com-*

missioner v. *Estate of Church, supra.* The Third Circuit there took the view that the question as to taxability under Section 811 (c) is essentially one of fact and the Tax Court's determination must be accepted as final under the *Dobson* rule. We submit that the *Church* case is patently unsound.

Transfers such as these, where the distribution of the corpus must await the grantor's death, are necessarily intended to take effect in possession or enjoyment at or after such death as a matter of fact. And indeed this was recognized in *Reinecke* v. *Northern Trust Co., supra,* p. 347. The only question at issue is whether they were so intended as a matter of law. That question is one of statutory interpretation and therefore one of pure law. Moreover, it turns upon a generalizing principle with respect to the efficacy of a possibility of reversion by operation of law which has been specifically included in the regulations ever since they were amended in 1940 to conform with what was considered to be the effect of the decision of this Court in the *Hallock* case. Therefore the instant case and the *Church* case involve (1) the meaning of the statute, (2) a generalizing principle and (3) the validity of the regulations.

Here the question is not merely whether the facts fit the pattern of the statute, but also what that pattern is and whether the regulations con-

form to it. That is a question for the appellate courts, and it is our understanding that in circumstances such as these the *Dobson* rule not only does not preclude review but affirms the right thereto. *Dobson* v. *Commissioner, supra,* pp. 492–493, 502; *John Kelley Co.* v. *Commissioner,* 326 U. S. 521, 529; *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, 370–371; *Commissioner* v. *Estate of Bedford,* 325 U. S. 283, 292; *Commissioner* v. *Estate of Holmes,* 326 U. S. 480; *Crane* v. *Commissioner,* 331 U. S. 1; *McWilliams* v. *Commissioner,* Nos. 945, 946 and 947, 1946 Term, decided June 16, 1947.

Attention is called to the fact that in the *Holmes* case, which was an estate tax case involving a question as to Section 811 (d) of the Internal Revenue Code, this Court reversed both the Circuit Court of Appeals and the Tax Court. And indeed, in the *Hallock* case itself the Court reversed both the Circuit Court of Appeals and the Tax Court.

In the circumstances it is submitted that there is little doubt that the Circuit Court of Appeals for the Seventh Circuit was correct in holding that it had power to reverse the decision of the Tax Court in the instant case, and the Circuit Court of Appeals for the Third Circuit was wrong in holding that the Tax Court's decision in the *Church* case should be treated as final.

CONCLUSION

The judgment of the Circuit Court of Appeals was correct and should therefore be affirmed.

Respectfully submitted.

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OCTOBER 1947.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In

this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

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